

No. 21,068 ✓

United States Court of Appeals
For the Ninth Circuit

ILLINOIS TOOL WORKS, INC.,
vs.

Appellant,

REX L. BRUNSING, et al.,

Appellees.

}

PLAINTIFF-APPELLANT'S OPENING BRIEF

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Subject Index

	Pages
Introductory comments	1
Statement of the case:	
The proceedings in the District Court	2
The Holmberg patent in suit	3
The Poupitch patent in suit	5
The accused devices	6
Specification of errors	7
Argument:	
Prefatory comment	11
Defendants infringed the Holmberg patent	11
The doctrine of file wrapper estoppel is inapplicable as to the Holmberg patent	21
Defendants infringed the Poupitch patent	23
The Court erred in applying file wrapper estoppel with regard to the Poupitch patent	29
A narrow claim construction is not warranted by reason of the prior art teachings	31
Infringement is not avoided by non-use of the specific embodiments shown in the patents	32
Conclusion	34
Appendix:	
List of plaintiff's exhibits	i
List of defendants' exhibits	iii
Claims of Holmberg patent charged as being infringed..	iv
Claims of Poupitch patent charged as being infringed ..	ix
Holmberg patent drawings	xi, xii
Poupitch patent drawings	xiii

Table of Authorities

Cases	Pages
Bianchi v. Barili (9 Cir. 1948), 168 F.2d 793.....	28
Cameron Iron Works v. Stekoll (5 Cir. 1957), 242 F.2d 17	30
Chicago Pneumatic Tool Co. v. Hughes Tool Co. (10 Cir.	
1938), 97 F.2d 945, cert. den. 305 U.S. 643.....	14
Del Francia v. Stanthony Corporation (9 Cir. 1960), 278 F.2d 745	35
Graver Mfg. Co. v. Linde Co. (1950), 339 U.S. 605, 70 S.Ct.	
854	35
Hansen v. Colliver (9 Cir. 1960), 282 F.2d 66.....	
.....	18, 19, 21, 25, 27, 29, 35
Kemart Corp. v. Printing Arts Research Laboratories (9 Cir. 1953), 201 F.2d 624.....	35
Leeds & Catlin v. Vietor Talking Mach. Co. (1909), 213 U.S.	
301, 29 S.Ct. 495	30
Locklin v. Switzer Brothers, Inc. (9 Cir. 1961), 299 F.2d	
160, cert. den. 369 U.S. 861.....	26
National Rejectors v. A. B. T. Mfg. Corp. (7 Cir. 1951), 188 F.2d 706, cert. den. 342 U.S. 828.....	28
Neff Instrument Corporation v. Cohu Electronics, Inc. (9 Cir. 1961), 298 F.2d 82.....	19, 24
No-Joint Concrete Pipe Co. v. Hanson (9 Cir. 1965), 344 F.2d 13, cert. den. 382 U.S. 843.....	20, 23, 29
Paper Bag Patent Case (1908), 210 U.S. 405, 28 S.Ct. 748..	33
Payne Furnace & Supply Co. v. Williams-Wallace Co. (9 Cir. 1941), 117 F.2d 823.....	30
Reinharts, Inc. v. Caterpillar Tractor Co. (9 Cir. 1936), 85 F.2d 628	15
Smith v. Mid-Continent Inv. Co. (8 Cir. 1939), 106 F.2d	
622	33
Stearns v. Tinker & Rasor (9 Cir. 1957, reh. den. 1958),	
252 F.2d 589	15

TABLE OF AUTHORITIES

iii

	Pages
Stuart Oxygen Co. v. Josephian (9 Cir. 1947), 162 F.2d 857	13, 16, 27, 28
Stubnitz-Greene Spring Corp. v. Fort Pitt Bedding Co. (6 Cir. 1940), 110 F.2d 192.....	26
United States v. Parke, Davis & Co. (1960), 362 U.S. 29, 80 S.Ct. 503	34
Watters v. Kny-Scheerer Corporation (2 Cir. 1933), 68 F. 2d 27	18
Winans v. Denmead (1853), 15 How. (56 U.S.) 330.....	13, 16
Wire Tie Mach. Co. v. Pacific Box Corporation (9 Cir. 1939), 102 F.2d 543.....	30

Statutes

28 U. S. Code:

Section 1291	1
Section 1338(a)	1
Section 2107	1

Rules

Federal Rules of Civil Procedure:

Rule 42(b)	2
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Rules of Court of Appeals for the Ninth Circuit:

Rule 18(d)	7
------------------	---

Rules of Practice in Patent Cases:

Rule 312	21, 22
----------------	--------

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ILLINOIS TOOL WORKS, INC.,

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Appellees.

PLAINTIFF-APPELLANT'S OPENING BRIEF

Plaintiff-appellant files this opening brief in support of its appeal from a judgment of the District Court finding that defendants have not infringed any of the claims of plaintiff's patents 2,646,911 and 2,923,406.

JURISDICTION

Jurisdiction of the District Court is based upon U.S. Code, Title 28, Section 1338(a), this action having arisen under the patent laws of the United States.

Jurisdiction of this Court is based upon U.S. Code, Title 28, Section 1291, this appeal being taken from a final decision of a District Court of the United States. The judgment was entered on March 18, 1966 and the notice of appeal was filed April 13, 1966 (C.T. 291), within the 30-day period provided by U.S. Code, Title 28, Section 2107.

STATEMENT OF THE CASE

The Proceedings In The District Court

The present action is a consolidation of two separate actions for patent infringement. It involves U.S. Patent No. 2,923,406 and U.S. Patent No. 2,646,911. Appellant owns both patents.

A pretrial order filed July 9, 1965 provided that the issue of infringement only was to be tried. "All other issues are to remain to be fixed for trial at such time as the Court may determine after passing upon this infringement issue" (C.T. 200-N). That order was made pursuant to a motion brought by appellees under Rule 42(b), F.R.C.P. The trial commenced September 15, 1965 and was concluded September 22, 1965.

Appellant contends that appellees have made, used and sold devices covered by claims 1, 2, 4, 5, 7, 8, 9, 10, 11, 12 and 13 of U.S. Patent No. 2,646,911, issued to L. O. Holmberg on July 28, 1953 (hereinafter referred to as the "Holmberg patent"), and claims 1 and 2 of U.S. Patent No. 2,923,406, issued to O. J. Poupitch on February 2, 1960 (hereinafter referred to as the "Poupitch patent"). The claims which are charged as having been infringed are printed in the appendix to this brief, together with copies of the patent drawings.

The "related evidentiary issues" specified by the pre-trial order (C.T. 200-F) were:

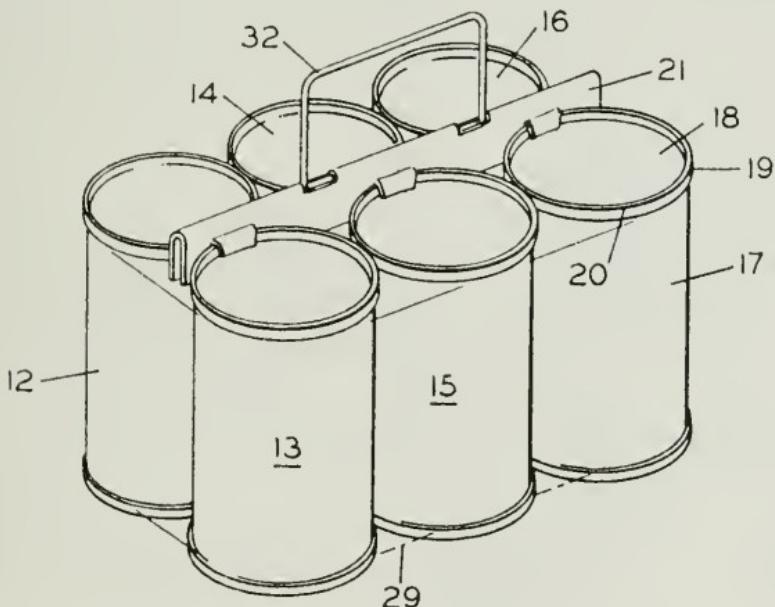
(a) "Whether defendants' container carrier clips come within the terms of any of the claims of the patents in suit."

(b) "Whether defendants' container carrier clips come within the scope of any of the claims of the patents in suit as interpreted by proper application of the Doctrine of Equivalents."

(c) "Whether plaintiffs are estopped by reason of the proceedings had in the Patent Office leading to the issuance of the patents in suit from asserting an interpretation of the claims of the patents which would cover the devices of defendants."

**The Holmberg
Patent In Suit**

A cut of the carrier package shown and described in the Holmberg patent is illustrated below.



In brief, Holmberg provides an elongated unitary structure forming a carrier package for pairs of conventional cans and having longitudinally spaced slots or throats

gripping the opposite faces of the pairs of can beads (PX 1). The Holmberg carrier is used with containers having projecting top rims and it comprises a body provided with pairs of oppositely disposed can-holding devices. Each can-holding device has an outside can-engaging grip (that portion of the body member forming the bottom of a slot and which is curved to mate with the outer surface of the can) and an inside can-engaging grip (that portion above the same slot which is curved to conform to the inner surface of the can rim). The inside can-engaging grip contacts the inside surface of the top rim of a can as to oppose the supporting engagement of the lower body portion below the slot and as to confine the rim of a supported can. The spacing between oppositely disposed can-holding devices is such that the bottom edges of a pair of supported cans are brought together and contact each other, each can counterbalancing the other.

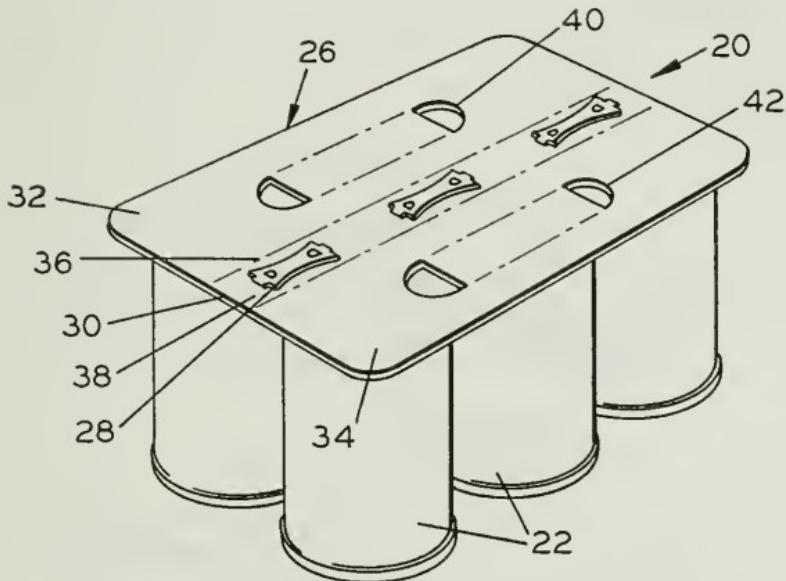
One object of the invention "is to provide a carrier which will support a plurality of grouped containers in such a manner that labels or advertising matter on the exterior of the containers may be clearly displayed" (PX 1, Col. 1, ll. 7-11). Another object "is to provide a carrier which may be quickly attached to or removed from a plurality of containers and which is simple in construction and economical to manufacture" (PX 1, Col. 1, ll. 24-26); and a further object "is to provide a carrier which engages only the top edge portions of said containers" (PX 1, Col. 1, ll. 28-30).

The Holmberg patent also contemplates other and additional details of construction, some of which are used by the accused device and some of which are not. For example,

Holmberg contemplates providing a handle or other means for manually grasping the body to carry the containers; the accused device provides finger openings in the body for the same purpose. The Holmberg patent also contemplates, however, that the handle may be formed separately from the body of the carrier and slideably mounted in spaced slots provided in the upper margin of the body. This detail of construction was not used in the manufacture of the accused device, but, then, none of the claims charged as having been infringed recites that detail, which is covered by claims 3 and 6, not here in issue.

The Poupitch Patent In Suit

A cut of the carrier package shown and described in the Poupitch patent is illustrated below.



Plaintiff's Poupitch patent (PX 3) adds to the teaching of Holmberg in providing a carrier that grips the can beads with a snap action. The inventor worked with Holm-

berg and his invention was to be an improvement over Holmberg (C.T. 279, Finding of Fact XVI). The operation of Poupitch is essentially the same as Holmberg except that a clip is applied to the containers by snap action. Each clip comprises inside and outside can-engaging means, one of which is made of resilient material for relatively spreading the margins between the can-engaging means. One specific object of the invention is to "provide a novel one-piece sheet material clip of the type mentioned above which is adapted to be resiliently snapped onto a plurality of rims of adjacent containers in a manner which provides a positive interlock between the clip and the containers so as to prevent subsequent removal of the containers until portions of the clip have been spread apart" (PX 3, Col. 1, ll. 34-40).

The Accused Devices

A cut of the carrier package formed with the accused devices is shown below.



The accused devices, like the carriers of Holmberg and Poupitch, relate to structures for carrying multiple numbers of containers having projecting top rims (C.T. 277 Finding of Fact XI). The purpose of all three structures is to provide a method of conveniently holding together and transporting a number of these containers (C.T. 277, Finding of Fact XI).

The defendants' accused device is a relatively flat plastic structure made by an injection molding process. It has three opposingly disposed interdependent sets of can-holding devices or clips (C.T. 280, Finding of Fact XX). Each can-holding device comprises an outside can-engaging means (one portion of a central rib) and an inside can-engaging means (a depending tongue or tab). Each tongue depends from the clip and engages the inside surface of the top rim on the can at such a location that it opposes the upward supporting engagement of the rib. Both the tongue and complementary rib are curved to conform with the cylindrical surface of a can. The margins between the tongue and rib define a horizontal slot or space which receives the rim of a supported can, and a pair of cans mounted in an interdependent set of can-holding devices contact each other adjacent their bottom edges, each can counterbalancing the other.

SPECIFICATION OF ERRORS

Pursuant to Rule 18(d) of this Court, Illinois Tool Works, Inc. urges that the District Court erred:

1. When it construed the claims of the patents in suit collectively "in light of the specifications and drawings" with the result that the claims were limited to the specific

embodiment illustrated and described, each claim being treated as if it contained the same limitations (Findings of Fact XIII, XXI, XXII).

2. When it found that the accused device does not have a body which is U-shaped (Finding of Fact XXI).

3. When it found that the accused device does not have horizontal slots in its sides (Finding of Fact XXI).

4. When it found that the Holmberg patent claims call for a handle, or a handle means, or means for manually grasping without regard to claims devoid of such limitations, and when it found that "due to the nature of the manner in which Holmberg must operate, the structure is restricted to the handle disclosed" and that the finger holes of the accused device "are not the same as the Holmberg handle and are different in operation" (Finding of Fact XXI).

5. When it failed to find that claims 4, 11, 12 and 13 of the Holmberg patent do not require a body having a U-shaped cross-section or equivalent means for providing slots for receiving the rims of a pair of adjacent containers.

6. When it failed to find that claims 1, 2, 5, 7, 8, 9 and 10 of the Holmberg patent do not require the presence of a handle or equivalent means as an element of the claimed combination.

7. When it failed to find that none of the claims of the Holmberg patent requires that the carrier be made from sheet material.

8. When it failed to find that none of the claims of the Holmberg patent requires that the carrier be con-

structed such that a container be inserted or removed when it is at an intermediate angle to the structure, or vice versa.

9. When it failed to find that the finger holes of the accused device are the full functional equivalent of the "handle", "handle means" and "means adapted for manually grasping" as recited in claims 4, 11, 12 and 13 of the Holmberg patent.

10. When it found that certain remarks made in an amendment filed June 18, 1953 in the prosecution of the Holmberg patent (and with regard to issued claim 13 only) restricted all claims of the patent to a device "that relies for its operation on the action of gravity and which allows free entrance and exit of a container at an intermediate angle, and a free downward swinging action for seating the container, and a free upward swinging action to accomplish removal" (Finding of Fact XIV).

11. When it found that the Poupitch patent claims are limited to a clip holding two cans without a handle member and without a method of providing for a structure including a plurality of similar clips (Finding of Fact XXII).

12. When it failed to find that the accused device is a one-piece resilient sheet material clip as recited in claims 1 and 2 of the Poupitch patent.

13. When it failed to find that the resilient tongue of the accused device is the full functional equivalent of the resilient flexible spring means recited in claims 1 and 2 of the Poupitch patent.

14. When it failed to find that portions of the accused device provide shoulders that are placed in spaces formed at opposite sides of abutting cans as recited in claims 1 and 2 of the Poupitch patent.

15. When it found that file wrapper estoppel is applicable with regard to the Poupitch patent by reason of applicant's abandonment of application claim 14, said claim having been rejected by the Examiner on grounds that it was "aggregative, as the inclusion of a plurality of similar clips does not form a patentable combination" and because there is "no invention in providing the handle for any article" (Finding of Fact XIX).

16. When it found that plaintiff's combination patents in suit did not solve the problem of providing a carrier which would hold cans securely and still provide for relatively easy removal of the cans from the carrier (Finding of Fact VIII).

17. When it found that plaintiff's patents were never commercialized and are so-called paper patents (Finding of Fact IX).

18. When it found that the accused device does not in any way use the idea or principle or teaching of either of plaintiff's patents in suit and that the means in operation of the accused device are different from those of either of the patents in suit (Finding of Fact XXII).

19. When it found that defendants have not infringed any of the claims of either of plaintiff's patents in suit (Conclusion of Law IV).

20. When it failed to find that defendants have infringed the claims of plaintiff's patent in suit.

ARGUMENT

This appeal does not dispute any of the District Court's findings of fact as to the construction of the accused devices or to the manner of their operation in comparison with devices described in the patents in suit. The appeal is primarily concerned with issues of law and their application to issues of fact correctly found by the District Court. More particularly, the issues of law relate to well-established principles of claim construction including the doctrine of equivalency and the doctrine of file wrapper estoppel. The argument will proceed by considering each of the two patents in suit in light of "differences" relied upon by the District Court for its finding of non-infringement. The patents will be considered separately and the assigned errors will be related to points of law previously applied by this and other Courts.

Defendants Infringed**The Holmberg Patent**

The District Court found certain differences between the accused device and the invention of Holmberg. It will now be shown that none of the supposed differences avoids infringement. This portion of the argument relates to specification of errors 1 through 9.

First, the District Court found that "the accused device does not have a body which is U-shaped (or an inverted U shape) either in cross section or in end view" (C.T. 281). The "U-shaped cross-section" feature is defined in several of the claims as follows:

"... a body having a U-shaped cross-section and having oppositely disposed slots in the sides thereof . . ." (Claims 1 and 5)

"... a body having a U-shaped cross-section and having oppositely disposed horizontal slots in the sides thereof . . ." (Claim 2)

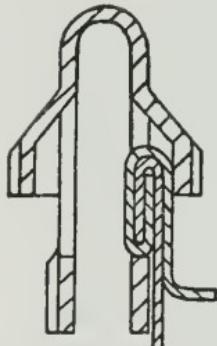
"... a body having a U-shaped cross-section and having oppositely disposed slots in its sides for receiving portions of the rims of said containers . . ." (Claim 7)

"... a body having a U-shaped cross-section and having a plurality of spaced slots in each side thereof . . ." (Claim 8)

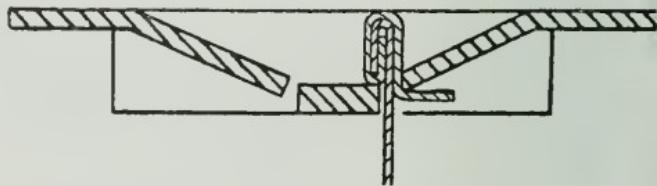
"... a body having a U-shaped cross-section and having spaced slots in each side thereof . . ." (Claim 9)

"... a body having a U-shaped cross-section . . ." (Claim 10)

At the outset, in order to emphasize the area as to which the foregoing claim language applies, there is shown below in side-by-side relationship, cross-sectional views of the Holmberg clip and the accused device.



Holmberg Clip



Accused Clip

In the case of the Holmberg clip, the cross-section of the body is shaped in the form of an inverted U, and the slots are located in the sides of the downwardly extending legs which form the U shape. On the other hand, in the case of the accused devices, the U-shaped

cross-section is in normal aspect, the legs of the U extending upwardly and diverging outwardly rather than in parallelism. In both cases, gripping is effected by those portions of the clip which extend downwardly from above.

Although there are obvious differences in appearance and while admittedly there is a change in shape, no different function has been shown to flow from such a difference. In each case, a single can is gripped from each side of the U, one part of the clip engaging the can exteriorly of and below the bead, and the other part engaging the can inside the rim. Appellant submits that the issue of whether the accused structure has a "U-shaped cross-section" can and should be resolved as a legal issue in support of infringement. In *Stuart Oxygen Co. v. Josephian* (9 Cir. 1947), 162 F.2d 857, this Court quoted from other authority and pointed out, page 861:

"... Where the particular form is not an embodiment of the principle of the asserted invention, the patent is not restricted to the exact form of the construction shown in the diagrammatical drawing. . . ."

This view as to a change in form not avoiding infringement was first announced in *Winans v. Denmead* (1853), 15 How. (56 U.S.) 329, where the Court pointed out, page 342:

"... If the machine complained of were a copy, in form, of the machine described in the specification, of course it would be at once seen to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of inventors

would be valueless, if it were enough for the defendant to say, your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed."

Furthermore, limiting the Holmberg patent to the exact form of the invention shown in the patent drawings is inconsistent with the final caveat of the specification (PX 1, Col. 4, ll. 30-36):

"The invention is not to be limited by the exact embodiment of the device shown, which is merely by way of illustration and not limitation, as various other forms of the device will, of course, be apparent to those skilled in the art without departing from the spirit of the invention or the scope of the claims."

The fact that a "U-shaped cross-section" is not a narrow novelty defining limitation is also shown by claims 4, 11, 12 and 13. None of them recites a carrier body having such a cross-section. Therefore, the supposed difference pertaining to "U-shaped cross-section" is not applicable to claims 4, 11, 12 and 13. Appellant submits that when claims are allowed by the Patent Office and some of them include a feature which others do not, that then the feature is not a narrow one requiring a perfect picture to make out a case of infringement [*Chicago Pneumatic Tool Co. v. Hughes Tool Co.* (10 Cir. 1938), 97 F.2d 945, 946-947, cert. den. 305 U.S. 643].

The second point of supposed difference between the accused device and that of the Holmberg patent, as found by the District Court, was "The accused device does not have horizontal slots in its sides" (C.T. 281).

Of those claims charged as being infringed, only claim 2 calls for "horizontal slots in the sides"; and claims 1, 4, 5, 7, 8 and 9 call for "slots in the sides". Claims 10, 11, 12 and 13 do not specify slots at all but, instead, the claims use such terms as "rim-engaging means" and "can-holding devices". Therefore, as to claims 10 through 13, infringement is controlled by the rule that it is the claims of a patent which measure the scope of the patent monopoly, not the illustration or description.

This rule was simply stated in *Stearns v. Tinker & Rasor* (9 Cir. 1957, reh. den. 1958), 252 F.2d 589, where this Court said, page 596:

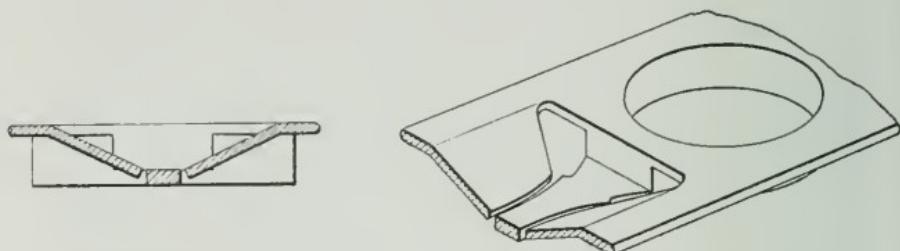
"It is axiomatic that only a claim of a patent can be infringed. The claims of a patent measure the scope of a patent monopoly. The claims may be explained and illustrated by the description. . . . But a description does not necessarily limit the claims. . . ."

This Court also held in *Reinharts, Inc. v. Caterpillar Tractor Co.* (9 Cir. 1936), 85 F.2d 628, 633-634:

"Appellant contends that the tractor described in the Wickersham specification is a 'frameless' tractor, and that the accused tractor is not of that type and, therefore, cannot be said to infringe the Wickersham patent. This contention must fail. Wickersham's invention is defined, not by the specification, but by the claims of his patent (citations omitted). There is in the claims no mention of a 'frameless' tractor. . . ."

Notwithstanding the fact that the carrier structures of claims 10 through 13 need not have slots, appellant submits that the accused device does, in fact, have "horizontal slots in its sides". This is shown by inspection of the

accused devices (PX 4, 4-A) and by reference to the following drawings of the accused clip:

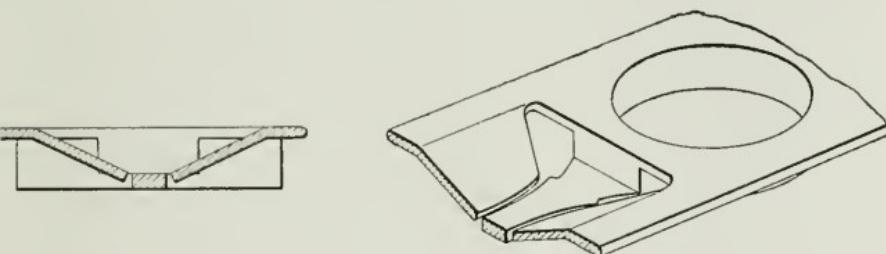


It will be apparent that the bead of a can is received through a curved horizontal slot formed between the lower rib and downwardly inclined tongue. Although the accused device differs in appearance from the carrier shown in the drawings of the Holmberg patent, both structures utilize a slot for the same purpose, namely, to embrace the bead edge of a can so that the can will be supported in the carrier. No different function flows from the mere fact that the sides of the accused device are inclined while the sides of the device shown in the Hohnberg patent are vertical. Infringement is not avoided by merely changing the form of the construction shown in the patent drawings. [*Winans v. Denmead* (1853), 15 How. (56 U.S.) 329; and *Stuart Oxygen Co. v. Josephian* (9 Cir. 1947), 162 F.2d 857].

The third point of difference found by the District Court was that the accused device "does not have any structure whatever below the vertical openings created by the space between the arcuate tongue and arcuate central rib" (C.T. 281). This supposed difference stems from a recitation in some claims that there are "portions below said slots being curved to conform to the contour of the

side walls of the containers". Only claims 1, 2 and 5 contain such recitations.

The District Court apparently overlooks the fact that the arcuate central rib of the accused device does, itself, extend below the opening between it and the arcuate tongue, and the further fact that the lower flange on the rib is curved to conform to the side walls of the containers. These details clearly show in the drawings below:



While there is a difference in degree as to the size and shape of the rib as compared with that body portion shown in the Holmberg patent drawings, neither the patent specification nor its claims so limits the invention.

A fourth difference found by the District Court is based on the fact that the accused device has a "resilient tongue" that allows the can to be inserted vertically and provides a "positive gripping action" that retains the bottoms of the cans in abutment at all times, whether the clip is resting or held (C.T. 282-283, para. nos. 4, 6, 7). The District Court distinguished such a structure from the one illustrated and described by Holmberg on the grounds that the patented device relied wholly upon gravity to keep the bottoms of the cans in abutment, and the cans are inserted or removed while they are at an acute or intermediate angle.

It is clear that gravity, by necessity, must produce a force upon the can carried by both the accused device and that shown in the Holmberg patent, a fact which defendant's expert admitted in his cross-examination (R.T. 568). Moreover, it has been held that a defendant cannot escape infringement merely by accomplishing the same result with a resilient member in lieu of or in addition to gravity. *Watters v. Kny-Scheerer Corporation* (2 Cir. 1933), 68 F.2d 27. At page 29 the Court said:

“Claim 4 calls for ‘pedally operated means for releasing the cover, and means for retaining the cover when closed.’ The means of the patent for retaining the cover when closed is its rearwardly tilted position plus the latch. But the defendant cannot escape infringement by omitting the latch and accomplishing the same result by the added weight of its baffle plate, or of its baffle plate plus a spring. These are within the range of equivalents which may fairly be accorded the patent, even though it be but a combination improvement. The same is true of claim 5.”

The Court's reliance upon an operational difference stemming from the use of a resilient tongue is to be regarded no more highly than as an improvement of the Holmberg clip. Although it may be an improvement to provide a resilient tongue as “an overhanging element”, the rule of patent claim construction is that one who simply improves a patented device without changing its manner of operation does not avoid infringement.

In *Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66, this Court considered an apparatus for replacing the fiber core

of a used wire rope with a new substitute core. The patented device disclosed a specific form of guide through which the used wire rope was drawn and the accused device used merely the top of a work table as a guide. At page 69, the Court said:

“In our view the accused device performs substantially the same function in substantially the same way and obtains the same results as are embraced in claim 1 of the patent. It may be, as indicated by the trial court, that appellees’ device is superior in its simplicity in the use of a table top instead of a guide. If the table top is an improvement it is nevertheless the equivalent of the guide and is merely a change in form. . . .”

Furthermore, only claims 11, 12 and 13 specify a carrier that utilizes gravity to bring the ends of the supported cans into abutment. As a consequence, the use of gravity cannot even be implied in claims 1, 2, 4, 5, 7, 8, 9 and 10. This is likewise brought out in *Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66, wherein the Court, page 69, referred to “the well established rule of construction that a broad claim will not be construed to contain limitations expressed in the more narrow claims.” It is settled that the accused device cannot escape infringement by merely adding features if it otherwise adopts the basic features of the patent [*Neff Instrument Corporation v. Cohu Electronics, Inc.* (9 Cir. 1961), 298 F.2d 82, 89-90].

The only other difference found by the Court in its comparison of structures relates to the use of “a handle or a handle means or means for manually grasping”. The Court recognized (C.T. 282, para. no. 5) that the accused

device provides "finger holes", but it regarded those holes as not being the same as the Holmberg handle. "This is because the accused device overcomes the action of gravity and the cans are securely retained in the accused device regardless of the position in which it is held."

With regard to the claims alleged as having been infringed, a handle is described in the claims as follows:

"... a handle for lifting said body portion with said containers secured thereto." (Claim 4)

"... handle means associated therewith . . ." (Claims 11 and 12)

"... means adapted for manually grasping for carrying the body . . ." (Claim 13)

None of claims 1, 2, 5, 7, 8 or 10 recites or includes a handle as a necessary part of the combination. Nor is there any reason for believing that a handle is an indispensable part of the invention. Of course, the use of a handle is desirable for carrying any can package assembly, whether it be a wire bale, as in the case of Holmberg, or the two-finger holes in the case of the accused clip. As a matter of substance, the only difference between Holmberg's handle and that of the accused clip is that the latter is made in one piece with the body of the carrier, whereas Holmberg assembled the handle means and the carrier as two pieces. But, a substantial body of law—

"... recognizes that infringement is not avoided by making into one part that which has been shown as two." [No-Joint Concrete Pipe Co. v. Hanson (9 Cir. 1965), 344 F.2d 13, 15, cert. den. 382 U.S. 843].

Significantly, other claims of the Holmberg patent, not in suit, define the handle with specificity. Claim 3 calls for "a retractable handle having its side portions slidably mounted in said slots"; and claim 6 recites "said body having openings . . . for receiving the ends of a handle member and means between the sides of said body for maintaining said ends in said openings." But no details of the handle are recited in any other claim of the patent. Hence, the court below applied an incorrect legal standard when it read specific structure into the Holmberg claims in suit [*Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66, 69].

**The Doctrine of File Wrapper Estoppel
Is Inapplicable as to the Holmberg Patent**

With regard to the Holmberg patent, the Court found that a certain statement made in an amendment during the patent prosecution limited the invention "to a device that relies for its operation on the action of gravity and which allows free entrance and exit of a container at an intermediate angle, and a free downward swinging action for seating the container, and a free upward swinging action to accomplish removal" (C.T. 279, Finding of Fact XIV). This finding is the basis for specification of error 10.

The statement which the Court refers to was made after the notice of allowance had already been issued, and only then for the purpose of having claim 21 of the application (claim 13 of the patent) entered under Rule 312 of the Rules of Practice in Patent Cases. Rule 312 provides:

"Amendments after the notice of allowance of an application will not be permitted as a matter of right,

but may be made, if the printing of the specification has not begun, on the recommendation of the primary examiner, approved by the Commissioner, without withdrawing the case from issue."

It is common practice for the Patent Office to refuse applicant the right to add any claims under Rule 312 unless he clearly shows that such claim is allowable for the same reasons that warranted the allowance of another claim in the case. Such reason had been given in the Holmberg application (DX V, pp. 32-33) wherein applicant stated:

"It will be noted that claim 21 reads clearly on the disclosed construction, as the changes referred to do not in any material respect enlarge the claim or touch upon the points of true novelty. Furthermore, the claim is allowable for the same reasons that warranted the allowance of claim 20 (patent claim 12). The character of the holding devices and their spacing so that the cans are held by the upper rim and the downward swinging action brings about an abutment at the bottom edge of the can is included in the claim and thus defines the essence of novelty of the invention."

Appellant submits that the argument made to the Patent Office in no way restricts Holmberg to a device that:

1. Relies for its operation on the action of gravity;
2. Allows free entrance and exit of a container at an intermediate angle;
3. Provides a free downward swinging action for seating the container; and

4. Provides a free upward swinging action to accomplish removal.

None of the four statements of operation and function referred to in the District Court's opinion (C.T. 279) is required of a carrier that holds cans by their upper rims and an abutment at the bottom edges of the cans. This is all the more evident since the accused structure clearly utilizes the "essence of novelty of the invention", as stated in the amendment of June 18, 1953.

Furthermore, none of the claims, not even claim 13 (application claim 21), defines the invention as being a carrier that relies for its operation on the action of gravity alone, or one that allows "free entrance and exit of a container at an intermediate angle", or one that provides a "free downward swinging action", or one that provides a "free upward swinging action". There simply is no basis for imposing limitations and restricting the Holmberg invention when the claims are devoid of such limitations. Moreover, the claims were not limited to escape cited prior art and, therefore, the doctrine of file wrapper estoppel is not applicable. [*No-Joint Concrete Pipe Co. v. Hanson* (9 Cir. 1965), 344 F.2d 13, cert. den. 382 U.S. 843]. Accordingly, appellant submits that the Court erred when it so restricted the invention by reason of the amendment of June 18, 1953.

Defendants Infringed The Poupitch Patent

The following portion of this argument relates to specification of errors 11 through 14.

Appellant submits that the District Court erred in its construction of the claims of the Poupitch patent as it did in its construction of the claims of the Holmberg patent. While it appears that the District Court had the claims of the Poupitch patent in mind it did not attempt to apply the claims to the structural features of the accused device.

The Court held that the Poupitch structure was limited to a clip holding two cans without a handle member and without a method of providing for a structure including a plurality of similar clips (C.T. 283). While it is true that both claims charged as having been infringed cover a clip structure for holding two cans and that there is no mention in either claim of a handle member, literal infringement is not avoided simply by providing a plurality of clips (rather than just one) and additionally providing a handle member [*Neff Instrument Corporation v. Cohu Electronics, Inc.* (9 Cir. 1961), 298 F.2d 82]. The fallacy of the Court's holding is highlighted by the patent disclosure. The very interpretation of the claims by such a limited construction means that structures made precisely as shown in Fig. 8 of the Poupitch patent do not come under that patent. For these reasons, appellant submits that the first point of difference noted by the District Court is irrelevant and immaterial to resolving the issue of infringement.

The second point of difference relied upon by the District Court was that the invention covered a "one-piece sheet material clip, while the accused device is not" (C.T. 283). Inasmuch as the accused device is clearly a "one-piece" structure, the Court must have found a difference

in the kind of "sheet material" used by defendant in its manufacture of its accused clip. The District Court apparently limited the claims of the Poupitch patent to the particular clip shown in the patent drawings, which is described in the specification as follows (PX 3, Col. 2, ll. 34-37) :

"The clip 28 is shown in detail in Figs. 1, 2 and 3 and it will be appreciated that this clip is of one-piece construction and is formed from sheet material such as resilient sheet metal. . . ."

Appellant submits that it is improper for the Court to limit the Poupitch patent on the basis of a mere reference to one type of material that may be used. The words "sheet material" admit of many types of materials, including plastics, as used in the accused device. Importantly, the plastic material used by defendant is resilient and, as the District Court found, the accused device itself is "a relatively flat plastic structure made by an injection molding process" (C.T. 280, Finding of Fact XX).

It is significant that no change in mode of operation is alleged to flow from any difference in the plastic material used in the manufacture of the accused device. Even though the substitution of plastic for metal may be considered an improvement, still infringement is not avoided [*Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66].

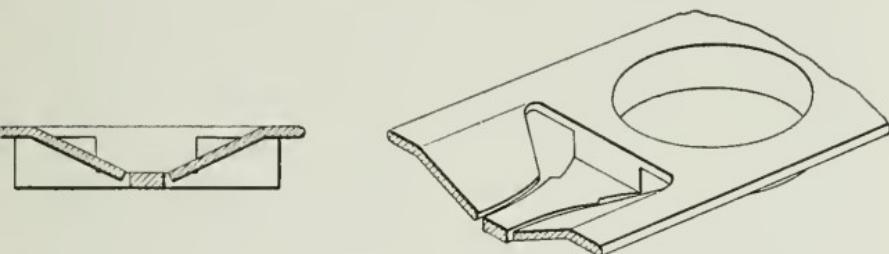
The Court's finding of no infringement was also based on the fact that the accused device supports the cans a certain distance apart while the cans shown in the Poupitch patent are "either actually abutting or very close together" (C.T. 283, Finding of Fact XXII).

The introductory portion of claim 1 describes a plurality of cylindrical cans that are “disposed in side-by-side substantially abutting . . . relationship”. Appellant submits that the accused device supports the cans in precisely that manner. Adjacent cans exert the same forces against each other if they abut through the interposition of a thin rib of plastic material as when they abut directly. Moreover, the word “substantially” so modifies the word “abutting” as to make it clear that precise abutment is not required. The word “substantially” is a word of art in patent claim drafting which connotes approximation [*Stubnitz-Greene Spring Corp. v. Fort Pitt Bedding Co.* (6 Cir. 1940), 110 F.2d 192, 198; and *Locklin v. Switzer Brothers, Inc.* (9 Cir. 1961), 299 F.2d 160, cert. den. 369 U.S. 861].

Appellant’s position that the accused device forms a package with cans that are “substantially abutting” is essentially the same as the holding in *Bianchi v. Barili* (9 Cir. 1948), 168 F.2d 793. In that case, the defendant argued that two adjacent rollers in a ravioli machine did not contact one another because the dough of the ravioli was interposed between the two rollers. There the Court rejected defendant’s argument as lacking in substance. The same ruling should apply in this case.

The District Court also found a difference between the accused device and that of the Poupitch patent in that the “claimed structure has two dependent tabs with shoulders which are placed in the spaces formed at the opposite sides of the abutting cans, while the accused device has no element whatsoever in these spaces.” (C.T. 283, Finding of Fact XXII, 3). It is believed that the

Court overlooked those rib portions of the accused device which hang downwardly into the same spaces occupied by the two dependent tabs of the Poupitch clip. These elements of the accused device are shown below:



Also, the end supports for the central rib provide the sole support of the engaged cans, just as do the dependent tabs illustrated in the Poupitch patent. Inasmuch as no change in mode of operation occurs as a result of the obvious difference in configuration, appellant submits that such a change does not avoid infringement [*Stuart Oxygen Co. v. Josephian* (9 Cir. 1947), 162 F.2d 857; *Hansen v. Col-liver* (9 Cir. 1960), 282 F.2d 66].

The only other difference between the patented structure and the accused device as found by the District Court (C.T. 283-284, Finding of Fact XXII, par. Nos. 4 and 5) resides in the fact that the device shown in the Poupitch patent utilizes a can rim support that is resilient and a rigid member for engaging the inside of the top of the rim, whereas the accused device provides a rigid supporting member and a resilient tongue for engaging the inside of the top of the rim. This difference, appellant submits, does not avoid infringement of either parent claim 1 or dependent claim 2. This difference is but a reversal of the function of cooperative parts within the purview of

authorities collected and applied in *National Rejectors v. A.B.T. Mfg. Corp.* (7 Cir. 1951), 188 F.2d 706, 708-709, cert. den. (1951), 342 U.S. 828. *Bianchi v. Barili* (9 Cir. 1948), 168 F.2d 793, 800 is to the same general effect.

Claim 1 of the patent provides: "one of said means (either the first or second locking means) comprising resiliently flexible spring means for relatively spreading said margins and opening said throats during assembly of the can package for receiving rims of cans disposed in substantially abutting parallel relationship sufficiently to enable said first locking means to be snapped beneath the can rims and for subsequently relatively shifting said margins together for closing said throats and locking the cans and the clip in assembled relationship so that the cans cannot be thereafter removed from the clip until said margins have again been relatively shifted and spread apart." Thus, the invention as claimed fully contemplates that the "resiliently flexible spring means" may be provided either as a part of the "tabs" or as part of the "flanges". This is particularly true since the specification closes with the following statement (PX 3, Col. 4, ll. 57-61):

"While the preferred embodiments of the present invention have been shown and described herein, it is obvious that many structural details may be changed without departing from the spirit and scope of the appended claims."

Even if the accused structure be considered an improvement over that shown in the Poupitch patent, still infringement is not avoided under the previously cited authorities of *Stuart Oxygen Co. v. Josephian* (9 Cir.

1947), 162 F.2d 857, *Hansen v. Colliver* (9 Cir. 1960, 282 F.2d 66, and *No-Joint Concrete Pipe Co. v. Hanson* (9 Cir. 1965), 344 F.2d 13, cert. den. 382 U.S. 843.

For the reasons stated, plaintiff submits that both claims of the Poupitch patent are infringed both literally and substantively by the accused clip.

**The Court Erred in Applying
File Wrapper Estoppel With
Regard to the Poupitch Patent**

The District Court found that file wrapper estoppel is applicable with regard to Poupitch (C.T. 280, Finding of Fact XIX). The basis for this estoppel as specified in the Court's Memorandum of Decision is that claim 14 was abandoned after it had been "rejected by the examiner on the grounds that it was 'aggregative, as the inclusion of a plurality of similar clips does not form a patentable combination,' and because there is 'no invention in providing a handle for any article.' . . ."

The import of the Court's finding suggests that the Poupitch patent covers only devices for holding two cans at a time and that by reason of using three clips rather than one, defendants' accused device avoids infringement. The Court's finding further suggests that by cancelling claim 14, the inventor limited his invention only to devices that did not use a handle and, therefore, defendants' use of a handle as part of its carrier avoids infringement.

Although the doctrine of file wrapper estoppel prevents applicant from now asserting invention on the concept of simply providing a plurality of clips or a handle, that

doctrine certainly does not mean that the claims of the patent do not cover the device which is shown in Fig 8 of the patent. The mere fact that the applicant acceded to the rejection of claim 14 has nothing to do with the scope or construction of claims 1 and 2.

Appellant is unaware of any decision that would support the District Court's use of file wrapper estoppel as to claims which have been neither amended nor cancelled from the application. Moreover, the Court's use of the doctrine to restrict the invention of claims 1 and 2 in light of a cancelled claim to different subject matter is directly contrary to this Court's decision in *Payne Furnace & Supply Co. v. Williams-Wallace Co.* (9 Cir. 1941), 117 F.2d 823, cert. den. 313 U.S. 572, where it held, page 828:

"... The rejected claims were for different combinations, and as we understand it any estoppel could extend no further than to the canceled combinations. *Johnson Co. v. Philad Co.*, 96 F.2d 442, 444."

Each claim stands on its own footing and is to be regarded as a separate specification of invention. *Leeds & Catlin v. Victor Talking Mach. Co.* (1909), 213 U.S. 301, 319, 29 S.Ct. 495; *Wire Tie Mach. Co. v. Pacific Box Corporation* (9 Cir. 1939), 102 F.2d 543, 551; and *Cameron Iron Works v. Stekoll* (5 Cir. 1957), 242 F.2d 17. As far as claims 1 and 2 are concerned, it makes no difference whether the accused device possesses one or three pairs of can-holding devices, nor does either claim require the use of a handle. Accordingly, appellant submits that the doctrine of file wrapper estoppel as applied by the District Court was erroneous.

**A Narrow Claim Construction
Is Not Warranted By Reason
Of Prior Art Teachings**

This portion of the argument relates to specification of error 16.

The District Court found that:

“The prior art introduced demonstrates that both of plaintiff's combination patents in suit were improvements, but did not solve the problem of providing a carrier which would hold cans securely and still provide for relatively easy removal of a can from the carrier.” (C.T. 277, Finding of Fact VIII)

There was essentially no testimony given during trial as to the teaching of any prior art references. Defendants' counsel, after reading the names and numbers of ten patents, merely asked defendants' witness the following questions and received the following answers:

“And I will ask you if these, each of them have some elements which, in a general way, in your opinion, constitute part of the prior art?

“A. Yes. Do you want me to go over each one?

“Q. No, no.

“Now, just two more, McWethy, 2519149, application filed June 7, 1948, issued August 15, 1950.

“And the only reason I hand you this separately—is there any tipping action disclosed in that patent that finds some similarity in the Holmberg?

“A. McWethy teaches inserting one of two pails in a holder by tipping the pail during the step of inserting it.” (R.T. 521-522)

There was no further testimony on the prior art during the trial. Defendant simply placed in evidence a book of prior art patents (R.T. 531; DX X) containing 17 patents,

only five of which relate to a package of containers and none of which anticipates the claims of either patent in suit. Importantly, defendant offered no reason or explanation which would justify the Court's narrow construction of the patent claims. Even defendants' brief after trial (C.T. 245-273) makes no mention of any prior art, let alone a showing as to what importance the prior art might have in limiting the claims. In contrast, Plaintiff's Opening Brief After Trial (C.T. 228-235) analyzed the prior art contained in defendants' book of prior art patents (DX X) to show that there was absolutely no reason for applying a limited construction to the claims. Clearly, the accused structure is neither based on nor derived from the prior art.

**Infringement Is Not Avoided By
Non-Use Of The Specific Embodiments
Shown In The Patents**

The following arguments relate to specification of error 17.

The District Court found that "plaintiff's patents were never commercialized, and are so-called 'paper patents.' " (C.T. 277, Finding of Fact IX). This finding was made solely on the basis that appellants had not commercialized the exact form of the invention illustrated and described in the specification (R.T. 139-140). The finding completely ignores the fact that defendant's own use of the invention in the manufacture and sale of "some 30-odd million of the accused device" (C.T. 277, Finding of Fact X) itself demonstrates a commercial success of the invention. In any event, a patent does not become a "paper patent" merely because the owner does not use the construction

shown in the drawings and described in the specification [*Smith v. Mid-Continent Inv. Co.* (8 Cir. 1939), 106 F.2d 622].

Appellant submits that the finding that the patents in suit are "paper patents" clearly shows that the District Court viewed the invention of each patent as being specifically limited to the exact embodiment shown and described. But even "paper patents" (those that have not been put into commercial use by the patent owner) are entitled to protection [*Paper Bag Patent Case* (1908), 210 U.S. 405]. The *Paper Bag Patent Case* also supports appellant's contention that non-use of the exact embodiment shown and described in a patent is no reason for disregarding both the claims of the patent and the doctrine of equivalency in determining the issue of infringement.

The facts of the *Paper Bag Patent Case* are similar to those of this case in that defendants urged that the patent was to be limited by the detailed description contained in the specification, especially since the owner of the patent did not use the invention. But the Supreme Court said, page 418:

"We think it is clear that the court considered that Liddell (the patentee) sought to comply with § 4888 of the Revised Statutes. In other words, he filed a description of his invention, explained its principle and the best mode in which he 'contemplated applying that principle,' and did not intend to give up all other modes of application. An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth. 'The principle of the invention is a unit, and invariably the modes of its embodiment

in a concrete invention may be numerous and in appearance very different from each other.' Robinson on Patents, § 485. The invention, of course, must be described and the mode of putting it to practical use, but the claims measure the invention. . . .'"

Thus, the District Court applied the wrong legal standard when it limited the invention upon the premise that neither of the specific devices was commercialized.

Errors 18, 19 and 20 are mere conclusionary errors based upon the prior mentioned errors and hence are not given separate treatment herein. These errors become moot if this Court does not accept appellant's contention with regard to any of asserted errors 1 through 17.

CONCLUSION

In conclusion, plaintiff asks that the judgment of the District Court be reversed and that U.S. Letters Patent No. 2,646,911 and No. 2,923,406 be held as infringed by the construction and use of defendants' accused devices, with instructions to try the remaining issues of fact.

The error below to which this appeal is directed resides in the improper application of law to the facts as found. As in *United States v. Parke, Davis & Co.* (1960), 362 U.S. 29, 44: "'The District Court premised its ultimate finding . . . on an erroneous interpretation of the standard to be applied.'" Although the question of infringement is normally one of fact, in this case the facts are not in

dispute. Therefore, the question of infringement resolves itself into one of law, depending on a comparison between the patent claims in issue and the accused devices, and the correct application thereto of the law of equivalency. *Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66; *Kemart Corp. v. Printing Arts Research Laboratories* (9 Cir. 1953), 201 F.2d 624; *Del Francia v. Stanthony Corporation* (9 Cir. 1960), 278 F.2d 745.

The proper standard of infringement is laid down in the landmark decision *Graver Mfg. Co. v. Linde Co.* (1950), 339 U.S. 605. There, at page 607, the Supreme Court said:

“In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out and that is the end of it.

“But courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law. One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention

and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.”

Respectfully submitted,
CARL HOPPE,
RICHARD R. TREXLER,
ERNEST M. ANDERSON,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL HOPPE,
Attorney for Appellant.

(Appendix Follows)

Appendix

Appendix

LIST OF PLAINTIFF'S EXHIBITS

		Iden.	Offered	Rec'd
1	Copy of Holmberg patent 2,646,911	20	20	21
2	Assignment from Lawrence O. Holmberg to Illinois Tool Works Inc. dated 11/12/63	21	30	30
3	Copy of Poupitch patent 2,923,406	23	23	23
4	Accused Phantom clip	25	25	26
4-A	Accused Brunsing clip	56	57	57
5-A	Chart, enlargement of Holmberg patent drawing	56	104	104
5-B	Chart, enlargement of Holmberg patent drawing	56	104	104
6	Holmberg clip colored in different colors	56	104	104
7	Comparison chart of Holmberg clip and Brunsing clip	47	104	104
8	Accused Phantom clip colored in different colors	49	104	104
9	Claim chart, Holmberg claim 1	59	104	104
10	Claim chart, Holmberg claim 2	65	104	104
11	Claim chart, Holmberg claim 4	65	104	104
12	Claim chart, Holmberg claim 5	69	104	104
13	Claim chart, Holmberg claim 7	71	104	104
14	Claim chart, Holmberg claim 8	74	104	104
15	Claim chart, Holmberg claim 9	76	104	104
16	Claim chart, Holmberg claim 10	76	104	104
17	Claim chart, Holmberg claim 11	76a	104	104
18	Claim chart, Holmberg claim 12	79	104	104
19	Claim chart, Holmberg claim 13	80	104	104
20	Written statement of Mr. Poupitch on Holmberg patent	58	104	104

List of Plaintiff's Exhibits—Continued

		Iden.	Offered	Rec'd
21	Chart enlargement of Poupitch patent	81	104	104
22	Poupitch clip exemplar	86	104	104
23	Comparison chart of Poupitch clip and Brunsing clip	91	104	104
24	Claim chart, Poupitch claim 1	93	104	104
25	Claim chart, Poupitch claim 2	102	104	104
26	Beer can, Heileman's Old Style	409	605	605
27	Yummy ginger ale can	409	605	605
28	Enlarged photograph of cross- section of can, Exh. 26	409	605	605
29	Photograph of cross-section of can, Exh. 27	410	605	605
30	Cut can	421	605	605
31	Defendants' advertising material	556	605	605
32	Defendants' advertising material showing accused clip	559	605	605

LIST OF DEFENDANTS' EXHIBITS

		Iden.	Offered	Rec'd
A-1	Holmberg exemplar	7	7	7
B-1	Poupitch exemplar	7	7	7
C-1	Brunsing exemplar	7	7	7
D	Exemplar made by Holmberg	108	110	111
E	Copy of U. S. Patent 2,874,835	149	531	533
F	Copy of U. S. Patent 3,016,136	157	531	533
G	Poupitch Clip	214	531	533
H	Sketch drawn by witness	215	531	533
I	Sketch drawn by witness	216	531	533
J	Receipt	241	244	244
K	Exemplar, clip, Specimen 1	244	244	244
L	Exemplar, clip, Specimen 2A	246	246	246
M	Exemplar, clip, Specimen 2B	247	247	247
N	Exemplar, clip, Specimen 3	247	247	247
O	Carrier, "Campbell's Tomato Soup"	247	247	247
P	Drawing	393	531	533
Q	Drawing	394	531	533
R	Drawing	395	531	533
S	Portion of accused device	445	531	533
T	Portion of accused device	459	531	533
U	File wrapper Poupitch patent	497	531	532
V	File wrapper Holmberg patent	503	531	532
W	Patent 2,815,855	529	531
X	Patents with exception of Fisher	531	530	530
Y	Campbell soup can	603	603	603

Claims of L. O. Holmberg

Patent No. 2,646,911

Charged As Being Infringed

1. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in the sides thereof, the portions below said slots being curved to conform to the contour of the side walls of the containers and portions of said body along the bottom edges of said slots providing supports for said rims, the portions above said slots being curved to conform to the inner surfaces of said rims and positioned to engage said inner surfaces when said rims are supported along said lower edges.
2. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed horizontal slots in the sides thereof, the portions of said sides below said slots being curved to conform to the contour of the side walls of the containers, the portions of said sides above said slots overhanging said first named portions and being curved to conform to the contour of the inner surfaces of said rims.
4. A carrier for containers having projecting top rims comprising a body having slots in the sides thereof for receiving said rims, body portions along the bottom edges of said slots being positioned to supportingly engage the under surfaces of said rims, body portions along the top edges of said slots being positioned to engage the inner surfaces of said rims and maintain the under surfaces of said rims in engagement with the body portions along

the lower edges of said slots and a handle for lifting said body portion with said containers secured thereto.

5. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in the sides thereof, said body having round cutout portions at the ends of said slots, the diameter of said round portions being greater than the width of said slots, body portions along the bottom edges of said slots shaped to conform to the contour of the surfaces of the side walls of said containers, body portions above said slots and between said rounded portions overhanging said second named portions shaped to conform to the contour of the inside surfaces of said rims and the edges of said slots being spaced to permit the insertion of said rims when the latter are disposed at an acute angle to the sides of said body.

7. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in its sides for receiving portions of the rims of said containers, the portions of said body along the lower edges of said slots being positioned to support the under surfaces of said rims and portions along the upper edges positioned to engage the inner surfaces of said rims whereby the lower margins of opposite containers abut each other when said carrier is supporting the containers.

8. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having a plurality of spaced slots in each side thereof, the distance between the centers of the slots corresponding to the diameter of the containers and the slots in

each side being aligned with each other whereby the lower margins of opposite containers abut each other when said containers are supported by their top rims in said slots.

9. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having spaced slots in each side thereof, the slots in each side being aligned with each other, whereby when said containers are supported by the under surfaces of their top rims the lower margins of opposite containers will abut each other and said containers will be supported in a substantially upright position by said carrier.

10. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section, rim engaging means on each side of said body in alignment with each other whereby the lower margins of opposite containers abut each other when said containers are supported on said body by their top rims.

11. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member having handle means associated therewith, a pair of oppositely disposed can-holding devices carried by said body member, each of which is adapted to engage one can, respectively of a pair of cans, at that portion of the top rim thereof which is disposed in close proximity to the other can, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can engaging means engaging the inside surface of said top rim at such location

thereon as to oppose the engagement of said outside can-engaging means, said inside and outside can-engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing downwardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can engaging means when the cans are swung downwardly in mutually supporting position.

12. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member having handle means associated therewith, a pair of oppositely disposed can-holding devices carried by said body member, each of which is adapted to engage one can, respectively of a pair of cans, at that portion of the top rim thereof which is disposed in close proximity to the other can, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can engaging means engaging the inside surface of said top rim at such location thereon as to oppose the engagement of said outside can engaging means, said inside and outside can engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing down-

wardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can engaging means when the cans are swung downwardly in mutually supporting position, and sufficiently spaced to permit the outward passage of the rim of the associated can therebetween when the can is tipped upwardly in opposition to the action of gravity.

13. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member including means adapted for manual grasping for carrying the body and a pair of independent can-holding devices each of which is adapted to engage the top rim of one can, respectively, of a pair of cans, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can-engaging means engaging the inside surface of said top rim at such location thereon as to oppose the engagement of said outside can-engaging means, said inside and outside can-engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing downwardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent

the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can-engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can-engaging means when the cans are swung downwardly in mutually supporting position, and sufficiently spaced to permit the outward passage of the rim of the associated can therebetween when the can is tipped upwardly in opposition to the action of gravity.

**Claims of O. J. Poupitch
Patent No. 2,923,406 Charged
As Being Infringed**

1. A can package comprising a one-piece resilient sheet material clip, and a plurality of cylindrical cans or the like having annular end rims disposed in side-by-side substantially abutting and parallel relationship securely retained by said clip, said rims having a predetermined thickness, said clip comprising generally planar horizontal body means substantially traversing an area of substantial abutment of the cans and spaces between the cans at opposite sides of said area, a plurality of first locking means integral with and depending from opposite end portions of said body means disposed in said spaces and presenting surfaces engaging beneath the rims of the cans, and a plurality of second locking means integral with said body means having portions located toward opposite ends of and depending from said planar body means and engaging inner surfaces of the can rims and respectively cooperating with said first locking means, each cooperable

pair of said first and second locking means having margins defining a throat which normally has a dimension transversely of a rim less than said rim thickness for preventing a rim of a can from passing therethrough, one of said means comprising resiliently flexible spring means for relatively spreading said margins and opening said throats during assembly of the can package for receiving rims of cans disposed in substantially abutting parallel relationship sufficiently to enable said first locking means to be snapped beneath the can rims and for subsequently relatively shifting said margins together for closing said throats and locking the cans and the clip in assembled relationship so that the cans cannot be thereafter removed from the clip until said margins have again been relatively shifted and spread apart.

2. A can package, as defined in claim 1, wherein said one means comprising said spring means is one of each of said cooperable pairs of locking means and is provided with rim engageable cam means for effecting relative movement between cooperable first and second locking means for permitting entry of a rim between said first and second locking means as an incident to the application of the clip to adjacent substantially abutting cans.

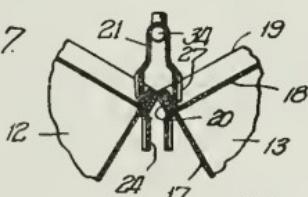
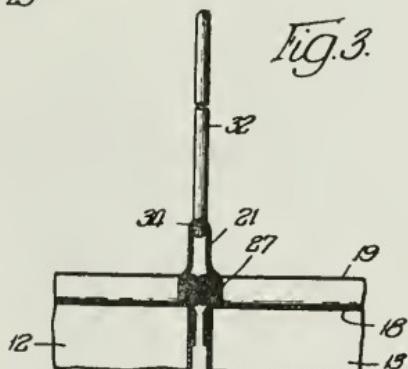
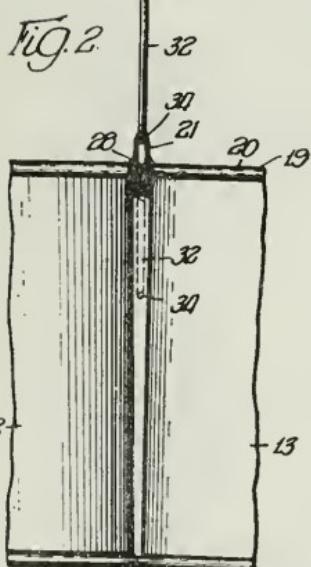
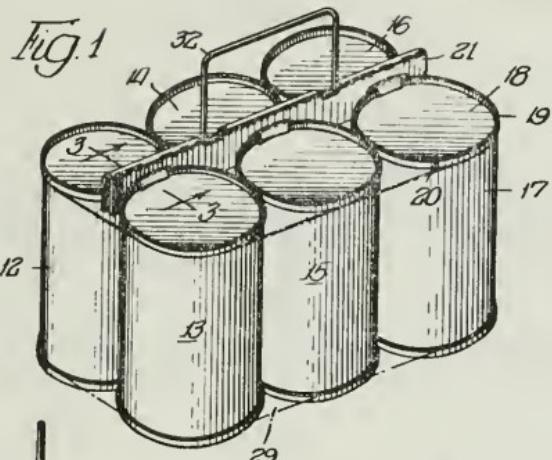
July 28, 1953

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CONTAINER CARRIER

2,646,911

Filed Aug. 19, 1949

2 Sheets-Sheet 1



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2,646,911

CONTAINER CARRIER

Filed Aug. 19, 1949

2 Sheets-Sheet 2

Fig. 4

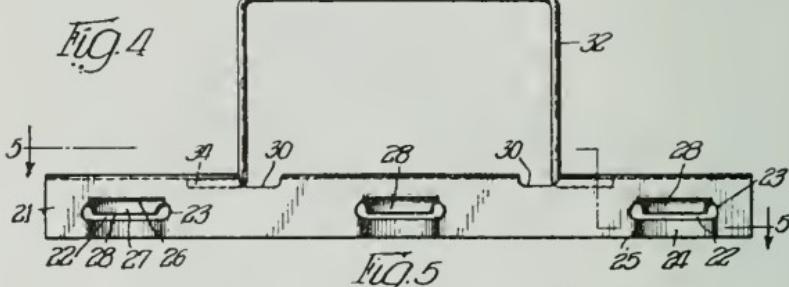
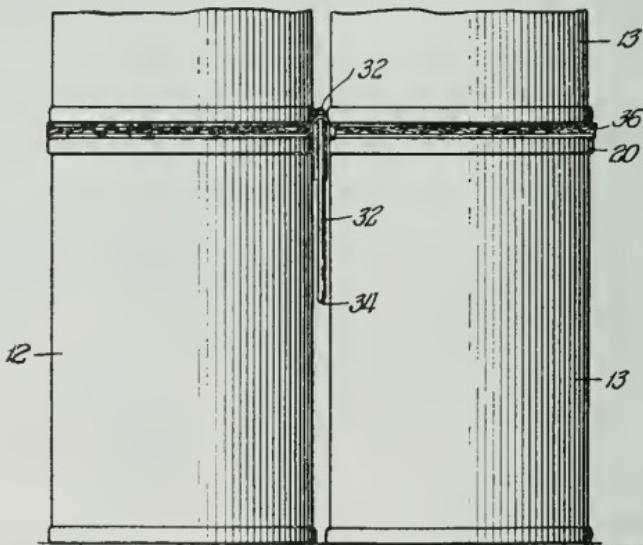


Fig. 5



Fig. 6



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Feb. 2, 1960

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2,923,406

CONTAINER CARRIER

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